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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Shelton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The opinion of the District Court is reported at 148 F. Supp. 926. The opinion of the Court of Appeals has not yet been reported. Both opinions are printed in Appendix A, *infra*, pp. 32 to 56.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

Questions Presented

Petitioner, a copy editor on the New York Times, refused to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee, for which refusal he was convicted of contempt under 2 U.S.C. § 192, fined, and sentenced to six months imprisonment. The questions presented in this case are:

1. May a witness subpoenaed by the Internal Security Subcommittee without probable cause or any reason to believe that he has ever been affiliated with, or has any information about, Communists or Communism, be convicted of contempt for failing to answer questions on that subject?

2. Was petitioner adequately apprised of the "question under inquiry", to determine whether he was within his rights in refusing to answer the Committee's questions?

3. May petitioner, a newspaperman, properly be convicted of contempt for refusing in the Internal Security Subcommittee's New York Times hearing to answer questions which infringed upon the freedom of the press?

4. Is an indictment which fails to set forth the "question under inquiry", sufficient under the Sixth Amendment to charge the offense of contempt under 2 U.S.C. § 192?

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[1] Under the statute and rules of this Court, this petition was required to be filed on July 18. Pursuant to order of Mr. Justice Frankfurter dated July 18, Rule 21.1 was waived; a single copy of corrected page proof was filed on July 18 and the full 40 printed copies of the petition were filed on July 20.

5. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

6. May a court separately convict and sentence a witness for contempt for refusing to answer two questions before a Congressional Committee, both falling in the generally defined area within which he has refused to testify?

Statutes and Constitutional Provisions Involved

The pertinent constitutional and statutory provisions in this case are set forth in Appendix B, *infra*, pp. 57 to 58.

Statement

In June of 1955 in the course of hearings on "Strategy and Tactics of World Communism", Winston Burdett, a radio commentator, testified before the Internal Security Subcommittee of the Senate Judiciary Committee (Tr. 83).[2] Burdett revealed that he had been a Communist Party member in the late 1930s and early 1940s while employed by the Brooklyn Eagle, and had engaged in Communist activities at home and abroad. He named a number of persons as former fellow Communists on the Brooklyn Eagle and the Newspaper Guild; those he named were then called and questioned by the Committee.

Subsequently, a new series of hearings was instituted involving New York newspapers, particularly the New York Times. In December, 1955, thirty-eight witnesses

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[2] All "Tr." references in this brief refer to the pagination of the reporter's transcript of trial proceedings.

(30 of them from the New York Times) were questioned in an executive session in New York City (Tr. 207-10). On January 4, 1956, the Committee commenced a public hearing which, although described by its Chairman as a "subsequent chapter to the Burdett testimony" (Tr. 84), was essentially an investigation into Communism on the New York Times or among its employees; of eighteen witnesses called in the hearings, fifteen were persons employed, formerly employed or otherwise connected with the New York Times (Tr. 212-14).[3]

It has never been clarified just how and by whom the New York Times hearing was called. The Committee had never met to authorize the January, 1956 Times hearing, although Rule 1 of the Committee's Rules states "No major investigation shall be initiated without approval of a majority of the subcommittee" (Tr. 197).[4] At the opening of the January, 1956 hearing, Senator Hennings, a Committee member, disclosed that there had been no prior Committee authorization, stating (Tr. 86): "I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings," and that "we

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[3] The Committee's hostility to the Times was evidenced by its publication, about a week before the Times hearings began, of a Report entitled, "Strategy and Tactics of World Communism, [Subtitle] Significance of the Matusow Case" in which it republished an old Harvey Matusow allegation that there were "well over one hundred" dues-paying Communist Party Members on the New York Times. In a footnote (at p. 28), the Committee Report mentioned a 1953 Matusow affidavit of recantation, but omitted the paragraph of that affidavit in which Matusow revealed the falsity of his earlier statement that he had known "well over one hundred" Communists among Times employees (Tr. 233-44, 289).

[4] Not only did Counsel Sourwine confirm this at the trial, he also revealed that he knows of *no* occasion since its adoption on which the Committee has ever given previous authorization for any of its hearings (Tr. 199-200).

have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee. . ." (Tr. 93).

Nor has it ever been clarified how the Times witnesses came before the Committee; indeed, it is unclear whether the witnesses had actually been subpoenaed by the Committee or by Counsel Sourwine. The Times hearings were apparently conceived by Sourwine in November, 1955 (see Tr. 144-47). But on the witness stand Mr. Sourwine declined (Tr. 140-43) either to admit or deny the truth of a report by James Reston in the New York Times of January 6, 1956 (Tr. 141), to the effect that:

> "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know any thing about them. They were issued under the name of Senator Eastland, but when this reporter called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

A. *Petitioner's Committee Appearance*

On November 14, 1955, a Committee aide arrived at the New York Times with approximately thirty subpoenas for Times employees. While none of the subpoenas was addressed to petitioner, one of them was made out to a "Willard Shelton", a nationally known columnist (Tr. 168). On discovering that Willard Shelton was not employed by the Times, the Committee aide made inquiry at the Times and was informed that there were "several" Sheltons employed at the Times, including petitioner, Robert Shelton,

employed on the "news side" (Tr. 165-173; 177-180). This information that there was no Willard Shelton on the Times but that there were several Sheltons there, including one on the news side, was communicated to Chairman Eastland through Counsel Sourwine. After some discussion of the problem, Chairman Eastland told Counsel Sourwine, according to the testimony of the latter (Tr. 144-145), "Well, go ahead and tell him to come." Thereupon, on instructions from Sourwine, the Committee employee added the words "or Robert Shelton" to the subpoena, and served it on petitioner (Tr. 145, 168). A new subpoena in petitioner's name alone was subsequently issued on November 23, 1955 and served on petitioner.

On December 7, 1955, petitioner appeared pursuant to the revised subpoena at an executive session of the Subcommittee in New York. He inquired why he had been called, and was told that the Committee was "clearing up a question of identity" (Tr. 50-51). Interrogated on a number of subjects, he answered some of the Committee's questions, but then refused to answer others (Tr. 47-73). When petitioner first indicated that he would refuse to answer certain of the Committee's questions relating to Communist associations or personal political matters, Counsel Sourwine said (Tr. 58-59):

> "I will state, Mr. Chairman, I am greatly surprised. I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. *The record will show that the witness was not charged with being a Communist.* Counsel said you are not a Communist and you never have been; isn't that right?
>
> "Mr. Fraenkel. Obviously that involves——

"Mr. Sourwine. The question does, of course, involve the answer, but I must admit to the chairman, I am taken by surprise.

"It may be that we shall have to question this witness more at length later."

Petitioner was recalled under the subpoena at the January 1956 public hearings of the Committee (see Tr. 75, 128). Petitioner made objection, prior to being sworn, that: "I fail to see why I am involved in this hearing" (Tr. 105) and subsequently stated (Tr. 114-115):

"I am involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today."

No response was made to petitioner's question, and he was sworn on the insistence of the Committee counsel (Tr. 106). He then freely answered a number of questions about himself, but refused to answer certain other questions inquiring into possible Communist associations and conversations with other persons, principally on the grounds that there was no justification for his having been called by the Committee, that the questioning was beyond the Commit-

tee's jurisdiction and violated his First Amendment rights (Tr. 106-128).

B. *The Procedings Below*

Following a Senate contempt citation, on November 26, 1956, petitioner was indicted on three counts under 2 U.S.C. § 192.[5] He was charged with refusal to answer the following three questions at the 1956 Committee hearing (J.A. 7-8): (1) "Are you, sir, a member of the Communist Party, U.S.A.?"; (2) "Did you ever have any conversation with Matilda Landsman?"; and (3) "What did you tell them (your employers)?"

The trial in the District Court commenced on January 14, 1957. The two principal issues at the trial concerned (a) the presence or absence of probable cause for the Committee's calling and interrogation of petitioner, and (b) whether the "question under inquiry" before the Committee had been made sufficiently luminous to petitioner at the time of his interrogation. We consider in order the facts as they emerged at the trial on these issues, which relate a most irresponsible episode in Congressional Committee investigatory procedure.

The Issue of Probable Cause

At the commencement of petitioner's trial, his counsel stated that the major factual issue at trial would concern "probable cause" for the Committee's calling and question-

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[5] Petitioner timely moved (J. A. 8) that the indictment be dismissed or that he be granted a preliminary hearing on the question of the fear and bias of the government employee grand jurors in a case involving allegations of Communist associations. Petitioner supported this motion with an affidavit like that involved in the *Watkins* case, 354 U.S. 178, setting forth facts showing that federal employees were questioned under the Federal Employees Security Program about their opinions concerning *Hiss, Coplon, Dennis,* and other such cases. The motion to dismiss or for a preliminary hearing was denied (J. A. 5).

ing of petitioner (Tr. 25-27, 37). Counsel asserted that at the time the Committee called petitioner it "had no information whatever about him", and that petitioner had been called "without any evidence that this was a man who had been in any way concerned with the communist movement or knew anything about it. . . . he was called before the committee, without any prima facie case or probable cause" (Tr. 25). Prosecuting attorney Hitz thereupon joined issue by asserting that no probable cause is required for a Congressional committee to subpoena anyone at all to inquire into his possible Communist affiliations. Mr. Hitz flatly affirmed that *"a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'"* (Tr. 32).[6] However, Mr. Hitz announced that he would not rely *solely* upon the proposition that no probable cause is required to haul a witness before a Congressional committee and inquire into his possible Communist associations; he offered to demonstrate that the Committee actually possessed information when it called petitioner that he had relevant information on the subject of its inquiry (Tr. 33-36). Accordingly, the prosecution sought to produce evidence

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[6] Mr. Hitz stated (Tr. 32; see also Tr. 164):

". . . any question that is pertinent to that subject [S. Res. 366] could be asked of anyone at all, even the most innocent person, as it developed or as it started, and could be asked of anybody whose identity was even unknown to the committee. I may say, to use the language of Mr. Rauh, that a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?' and if the person was, he should either answer or make a refusal to answer based upon some legal justification.

Now, we say that only with respect to a pertinent question. We don't think that a person off the street could be called in and asked, 'What are your political beliefs?' But we think that there is no reason why anyone couldn't be asked, 'Are you a member of the Communist Party?' and 'Tell us what you know about it.'"

of "probable cause" for the calling and questioning of petitioner.

The sole evidence along this line was provided by Counsel Sourwine. Although Sourwine had stated in the 1955 Committee hearing (Tr. 58) "the record will show that the witness [petitioner] was not charged with being a Communist", he now testified that information had previously been received by the Committee linking a "Shelton" on the Times with a Communist group on the Times (Tr. 44-46). According to witness Sourwine, some months before petitioner was called, a letter (signed by a pseudonym) was received from a "reliable" informant, stating that a "Shelton" on the news side of the New York Times "was a member of a Communist group on the Times", who "would be or should be in a position to give the committee information about the activities of that group" (Tr. 131-32). Though no first name for "Shelton" was given in the alleged anonymous letter, a Committee subpoena had then been issued for "Willard Shelton" at the Times (Tr. 46). Sourwine was unable to reveal how, in fact, the name "Willard Shelton" had been put on the Committee subpoena, when Willard Shelton had never been identified as a potential witness. Mr. Sourwine only volunteered a "surmise" (Tr. 139) that

> "Somebody in the typing section at some point, having the name Shelton and not having the first name, asked somebody else, 'What is this fellow Shelton's first name?' Somebody else said, 'What, what Shelton?' He said, 'The newspaperman Shelton.' And somebody who knew that there was a newspaperman named Willard Shelton said, 'Willard'."

Despite the fact that petitioner had made clear that probable cause was to be the major factual issue at the trial, Sourwine disclosed that he actually had not seen the alleged

anonymous letter for over a year before the trial (Tr. 268), nor bothered to examine it while preparing his testimony (Tr. 132-3). Moreover, cross-examination revealed that the identity of the "reliable" informant was unknown either to Sourwine or the Committee (Tr. 136-37); Sourwine purported to have identified the "reliable informant" as the author of the letter concerning "a Shelton" because of its resemblance to other letters from the same informant in its "typing" and its "tone" (Tr. 138-9). Sourwine then revealed that the purported letter also included the names of some 17 or 18 other persons identified by the anonymous informant (Tr. 249); however, the only one of the 17 or 18 names Sourwine could remember was that of "Shelton" (Tr. 270-4, 277, 287). Finally, when pressed further as to the contents of the alleged letter, whose "typing" and "tone" he earlier recalled, Sourwine conceded, "I have no actual independent memory of this particular letter as a sheet of paper and what was on it" (Tr. 270) and asserted that there had been a whole series of letters from the anonymous informant, but all Sourwine could recall was that one of them had mentioned a Shelton at the Times (Tr. 270-274).

At all stages of the trial the Government vigorously and vehemently opposed defense efforts to produce the supposed anonymous letter about which the Government had elicited the testimony of witness Sourwine. Prior to the trial, petitioner had subpoenaed Committee records to prove that there was absolutely no information concerning petitioner in the Committee files and that it had called him without probable cause. The Government vigorously opposed the subpoena and it was quashed by the Court at the outset of the trial as too broad (Tr. 8-30).[7] After testimony by Mr.

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[7] While the Court viewed the subpoena as too broad in asking for any material in the Committee files at the time of petitioner's questioning

Sourwine about the alleged anonymous informant's letter, petitioner moved repeatedly for the production of that letter (Tr. 134, 162-3, 244, 263) to prove that Sourwine's improbable and contradictory testimony as to its contents was false, that no such letter ever existed (Tr. 202, 283), and that the Government's "probable cause" contention was thus a fabrication. Sourwine, however, asserted that he would not produce the anonymous letter because it was "confidential" (Tr. 163, 312).

The Trial Judge was thus put in a difficult position, for he was aware (see Tr. 16-21) that he could not permit the Government to rely for its showing of "probable cause" on a document withheld from the defense.[8] The Court first sought to avoid the necessity of ordering production of the "letter" by a preliminary ruling that probable

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bearing upon him, this was, of course, the only way to prove the negative fact that no such material existed. The breadth of the subpoena would hardly have subjected the Government to any burdensome production process, for subsequent Government testimony revealed that the only alleged material available to the Committee was a single "letter."

[8] See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, cert. denied, 342 U.S. 920. It is also clear that on a challenge to the existence of probable cause, the so-called "informant's privilege" is inapplicable. *Roviaro* v. *United States*, 353 U.S. 53, 60-61. As the California Supreme Court recently emphasized (*Priestly* v. *Superior Court*, 50 Cal. 2d 812, —— P. 2d ——):

> ". . . only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

The problem created by the Government's attempt to rely upon what the Committee refused to divulge, was conceded by prosecuting attorney Hitz (Tr. 312):

> ". . . there is a technical problem arising within the confines of this courtroom . . . It has to do with the right of the defendant, as he asserts it, to further examine the witness Sourwine upon a document that we say procedurally, and as a matter of comity with another branch of the Government, and for reasons of national security, we preferred not to produce in court."

cause to call petitioner to the 1956 hearing was provided not by any "letter", but by petitioner's refusal in the 1955 executive session to answer certain of the Committee's questions (Tr. 264-267). Thereupon petitioner submitted a memorandum to the Court (see Tr. 307, 314) pointing out that the decisions of this Court prevent the fruits of an illegal search or seizure from being relied upon as probable cause for a subsequent search or seizure (*Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385)—that if there had been no probable cause to call and question petitioner at the 1955 hearing, his refusal there to answer certain questions could not constitute "probable cause" for calling and questioning him at the 1956 hearing.[9]

The Trial Judge was apparently persuaded by this view, for in rendering his opinion, he avoided relying for probable cause either upon the "anonymous letter" withheld at trial, or upon petitioner's refusal to answer questions at the 1955 session. Instead, the Court ruled that *probable cause for the exercise of a Congressional Committee's subpoena power to compel disclosure is not an issue cognizable by the courts in a subsequent contempt prosecution* (see *infra*, p. 40):

> "There is a complete want of precedent for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress, in conducting an inquiry for a legitimate legislative purpose, by permitting such committee,

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[9] It is also unclear on what theory petitioner's refusal at the December, 1955, hearing to answer Committee questions, on First Amendment and jurisdictional grounds, could, either as a matter of law or of fact, give the Committee grounds for belief that he possessed pertinent information. *Cf.* Pollitt, "Survey of Fifth Amendment Pleaders," 106 U. Pa. L. Rev. 1117 (1958), for a documented analysis of the question whether those who plead the Fifth Amendment privilege before the committees are in fact "guilty".

> and hence Congress itself, to compel the attendance and testimony of only such witnesses as the Courts might judicially determine were 'reasonably expected to be in possession of pertinent information'. The doctrine of 'separation of powers' and a rightful regard for the authority of the legislative branch of government refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress which alone is responsible for the exercise of the authority from which the disputed power arises."

The District Court thus sought to obviate the "probable cause" issue by flatly holding that probable cause to call and question a witness before a Congressional committee is not required. As an afterthought, the opinion weakly suggested that probable cause to question petitioner might be found in a different factor (one never suggested by the Committee, by witness Sourwine or the prosecution)—the Subcommittee's information of "Communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (*infra*, p. 40).

The Court of Appeals opinion leaves unclear whether it shared the view of the District Court that the Fourth Amendment is inapplicable to Congressional subpoena power. The Court quoted with approval from *United States* v. *Orman*, 207 F. 2d 148, 154-5 (3d Cir. 1953), a case in which "dragnet" Congressional examination of private citizens was held impermissible; however, the Court then sought to dispose of the probable cause issue in a single sentence of its opinion permitting precisely such dragnet investigation (*infra*, p. 56):

> "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call

appellant as a member of the working press to check on possible Communist Party activities among his fellow employees."

Thus, the court below held the Burdett testimony—that in the early '40s some Brooklyn Eagle and Newspaper Guild members had been Communists—sufficient to justify the Committee's calling at random fifteen years later any Times or "working press" employee to question him about his possible Communist associations.[10]

The "Question Under Inquiry"

Petitioner's initial uncertainty concerning the nature of the inquiry to which the Committee was subjecting him appears from a colloquy in the 1955 executive session (Tr. 56):

"Senator Hennings . . . having read your statement into the record, Mr. Shelton, are we to assume that

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[10] There are 5,700 New York Times employees; 30,000 "news reporting employees" in the country; and a far larger number of total employees on the 1,755 daily newspapers in the United States (see Tr. 180; 1959 Annual Report of the New York Times; Editor and Publisher Yearbook, 1960; Occupational Outlook Handbook, 1959, Bureau of Labor Statistics Bulletin 1255). And apart from the dragnet subpoena power which the decisions below would grant to a Congressional committee to call any of thousands of press employees because it had information that some few were Communists, the difficulty with this approach is that Mr. Sourwine made clear that the Committee did *not* call particular witnesses on any such basis. The following answer by Mr. Sourwine is illustrative:

"Q. I will repeat the question. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

"A. No. The committee called these people before it because it had information that the persons whom it called were in a position to give the committee information about matters it was investigating" (Tr. 223; see also 225-26).

your objection goes to the entire inquiry or to the question which has been put to you?

"Mr. Shelton. The actual basis for the inquiry has not been stated to me, nor does it appear on the subpoena."

Before he was sworn at the 1956 hearing, petitioner again stated (Tr. 105-106):

"I challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose . . . Furthermore, I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony."

On refusing to answer certain questions, including those for which he was tried for contempt, petitioner in each instance reaffirmed this challenge to the "jurisdiction of the committee". However, the Committee never once provided enlightenment to petitioner as to the "question under inquiry" nor his relationship thereto.[11]

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[11] Since the Committee hearing took place before this Court's *Watkins* decision, the Committee itself then felt no obligation to define to witnesses the nature of its inquiry. The Committee's then position appears from the 1955 executive session; when Mr. Sourwine gratuitously inquired of petitioner whether he knew his counsel (Osmond Fraenkel) to be a Communist, the following ensued (Tr. 64-65):

"Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would advise him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinency?

"Mr. Fraenkel. That is right.

"Senator Hennings. *The Chair might observe, sir that it would*

The "question under inquiry" in the New York Times hearing of the Committee was, from the first, doomed to remain in doubt, for the Committee had never even met to authorize the investigation, much less to determine its scope. As Senator Hennings stated at the opening (Tr. 86): "*the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings.*" The Times hearing accordingly covered a number of diverse and unrelated subjects without ever focusing on a single subject under inquiry. It has subsequently been suggested that when petitioner was interrogated: (1) there was no more limited question under inquiry than the authorizing resolution—i.e., than Communism generally; (2) the question under inquiry was Communist infiltration into news media; (3) the question under inquiry was Communist attempts to infiltrate the New York Typographical Union; and (4) the question under inquiry was Communism on the New York Times. In this case, one or more of these "questions under inquiry" were espoused by the Committee Chairman, by Senator Hennings, by prosecution witness Sourwine, and the courts below:

i. *The Committee Views.* The 1956 Times hearing was denominated by the Committee when it printed it as "Strategy and Tactics of World Communism, *Communist Activity in New York*" (Gov. Exh. No. 7). Senator Eastland, however, spoke of the hearing at the opening on January 4, 1956, as one to "pursue every lead which developed out of the Burdett testimony" (Tr. 83);[12] he said "we

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seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry."

[12] No one in this case has ever suggested that Burdett mentioned Robert Shelton or any Shelton, or provided a lead to any Shelton. As Counsel Sourwine testified below, the Committee never had any information concerning a Shelton at the Times, other than the alleged anonymous letter (Tr. 153).

are not . . . investigating any newspaper or any group of newspapers" (Tr. 87). Senator Hennings, on the other hand, said, "the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency" (Tr. 86).

ii. *The Prosecution's Theory.* A different theory was expressed in the Government's bill of particulars concerning the "question under inquiry" (J.A. 5-6). Prior to trial, petitioner had moved to quash the indictment because it failed to advise him of the "question under inquiry," an element of 2 U.S.C. § 192 (J.A. 8). Judge Holtzoff denied that motion, whereupon counsel asked instead for a bill of particulars as to the nature of the "question under inquiry" upon which the Government was relying under the indictment (J.A. 2-5). Judge Holtzoff granted that motion, and the prosecution stated in open court that the question under inquiry which the Government would prove under the indictment was the authorizing language of Senate Resolution 366, *and no more limited inquiry* (J.A. 6):

> "Mr. Hitz . . . As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purpose contained in the resolution and no lesser purpose . . ."[13]

[13] Earlier in the same colloquy Mr. Hitz had stated:

> ". . . the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing" (J.A. 3).

iii. *The Sourwine Evidence.* A still different view of the "question under inquiry" emerged from the trial testimony of Government witness Sourwine. He testified that there were three diverse questions simultaneously under inquiry at the time of petitioner's appearance (Tr. 195-196):

> "Q. . . . what was the question under inquiry when the defendant testified?
>
> "A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.
>
> "Q. So there are three gradations.
>
> "A. You can make as many gradations as you want. I am attempting to answer your question.
>
> "The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.
>
> "When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times, and communist

activity in an effort to infiltrate the Typographical Union in New York."

iv. *The Courts' View.* Contrary both to the bill of particulars and the government's proof, the District Court ruled in its opinion that: "The Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media" (J.A. 19-20) and that "the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies" (J.A. 19). The Court of Appeals opinion simply adopts Chairman Eastland's description of the hearing as one to investigate Communist activities to "influence American public opinion through the press" (*infra*, p. 50). Neither of the opinions below makes mention of the bill of particulars, although the binding nature of the bill on the "question under inquiry" was explicitly urged before both of the courts below (see Tr. 291-293).

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On January 18, 1957, the District Court convicted petitioner on the first two counts of the indictment and acquitted him on the third count (J.A. 22). Prior to sentencing, petitioner's counsel requested suspension of any sentence of imprisonment, particularly in the light of the accepted consideration of petitioner's unblemished prior record. The Court told petitioner that "so far as your personal demeanor before the committee of the Congress, you didn't display the contemptuous attitude that many in the same category do", but the Court then sentenced him on each count to a fine and six months' concurrent imprisonment without suspension, stating that "The press and the radio reports this morning matters that are very dis-

turbing from the standpoint of communism and its threats to our republican form of Government, and in this case I do not feel that I can put you on probation" (Tr. Jan. 25, 1957, pp. 2-6). The Court of Appeals affirmed the judgment of the District Court on June 18, 1960.

Reason for Granting the Writ

This Case Presents in Most Compelling Fashion, Fundamental and Unresolved Issues Concerning Congressional Investigatory Procedures, Related to Issues Presently Pending on Grants of Certiorari

The principal issues which emerged from the trial, and to which the opinions below are addressed, are those relating to probable cause, the "question under inquiry", and the Committee's impairment of freedom of the press; related issues are presently pending on petitions granted in No. 33, *McPhaul* v. *United States;* No. 37, *Wilkinson* v. *United States;* and No. 54, *Braden* v. *United States.* The Court of Appeals for the District of Columbia Circuit recently affirmed a number of other contempt of Congress convictions coming from the Un-American Activities Committee and the Senate Internal Security Subcommittee. While the Court may desire to postpone action on the petitions for certiorari being filed in some of those cases until the decision of related cases already before the Court, we urge that the instant case be heard at the present term of Court because it is closely related to and would provide additional illumination on the issues in the three cases wherein this Court has already granted certiorari.

i. *Probable Cause.* This case squarely presents the applicability to Congressional investigating power of the Fourth Amendment guarantee that compulsory process shall not be used to call and question the citizen unless there is probable cause to believe that he is in possession of information

relevant to the pending inquiry.[14] The opinions below reject the applicability of the Fourth Amendment's probable cause requirement to the subpoena powers of a Congressional investigating committee. The District Court's rejection of the Fourth Amendment's applicability was explicit; that of the Court of Appeals was implicit in its ruling that any or all of 5,000 Times employees (indeed, any one or all of 30,000 journalists on the working press), could be called and questioned about Communist activity, not because the Committee had reason to believe they were informed thereon, but only on the random and improbable chance that they might be. The court below held that because Winston Burdett had testified that in 1940 some members of the press had been recruited as Communists, 15 years later an investigating committee could subpoena at random any member of the working press in the United States "to check on possible Communist Party activities among his fellow employees."[15]

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[14] Arbitrary and unreasonable questioning of the citizen by a Congressional committee is treated here as violative of Fourth Amendment guarantees. It is, of course, equally true that such questioning violates Fifth and First Amendment rights and that arbitrary "fishing expeditions" by Congressional committees can neither be held to be within their authorizing resolutions nor to be pertinent to any "question under inquiry" within the meaning of 2 U.S.C. § 192.

[15] No longer having the benefit of new identifications of Communists in whom the public is interested, the Committees now reach persons never "named" either as participants in or witnesses to Communist activity; they are not called because they hav information relevant to the Committee's inquiry but on the mere possibility that they might. Thus, in 1958 the House Un-American Activities Committee subpoenaed Frank Wilkinson (see No. 37, October Term, 1960) when it found him in Atlanta organizing public sentiment against its hearings there. And most recently, the Senate Internal Security Subcommittee subpoenaed Linus Pauling under circumstances reported in the Washington Post of June 20, 1960:

> "He was subpoenaed Saturday night after he urged a nuclear test ban in an address before members of the Women's International League for Peace and Freedom at the Willard.
>
> Subcommittee Chairman James O. Eastland (D-Miss.) ordered Pauling to appear at 10 a.m. today to tell what he knows about 'Com-

Ever since this Court's decision in 1886 in *Boyd* v. *United States*, 116 U.S. 616, the probable cause guarantee of the Fourth Amendment (which is, to some extent, overlapped by the Fifth Amendment's due process requirement of reasonable governmental conduct) has been held applicable to the subpoena power. Perhaps the best summary of the Fourth Amendment's protection against all forms of governmental intrusion upon the privacy of the individual appears in the classic dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment*" (emphasis added).

The Fourth Amendment's probable cause requirement is today unquestionably applicable to every form of summons and subpoena, whether issued by a court (see *Boyd* v.

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munist participation in or support of a propaganda campaign against nuclear testing and other Communist or Communist-front activities with respect to which you may have knowledge.'

'I don't know anything about Communist activities', Pauling said at a news conference, 'but I'll be glad to educate members of the subcommittee on this very important matter of nuclear war.'"

United States, 116 U.S. 616), a grand jury (see *Hale* v. *Henkel*, 201 U.S. 43), a federal regulatory agency (see *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447) or an Executive Department (see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186).

The Fourth Amendment is equally applicable to Congressional subpoena power.[16] As early as *Sinclair* v. *United States*, 279 U.S. 263, 292, in the course of a thorough analysis of the Congressional investigatory power, this Court reviewed its interdictions of "fishing-expedition" abuse of the subpoena, and declared:

> "It has always been recognized in this country, and it is well to remember that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary and unreasonable inquiries and disclosures. . . ."

In *Watkins* v. *United States*, 354 U.S. 178, 188, this Court declared:

> "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure."

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[16] In *United States* v. *Orman*, 207 F. 2d 148, 154-155, speaking of Congressional committee investigative powers, the Court ruled out the idea that:

> "a congressional committee possesses the power to examine private citizens indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer . . . the United States in a contempt proceeding must prove . . . the relation of the questions, the documents *and the particular witness* to the investigation" (emphasis added).

Finally, only last year, in upholding the conviction in *Barenblatt* v. *United States*, 360 U.S. 109, 134, this Court made clear that Barenblatt's interrogation did not involve:

> *"indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."*

The rulings below would sanction just such Congressional "dragnet procedures." If these rulings are left unreviewed and Congressional Committees are permitted to exercise dragnet powers of compulsory interrogation of witnesses without probable cause, they are the only federal authority in the nation with subpoena powers beyond the reach of the Fourth Amendment. It is submitted that such a startling departure from our constitutional tradition, so clearly in conflict with the principles frequently announced by this Court, cannot go unreviewed. There is urgent need for this Court's authoritative disposition of the contention that probable cause is inapplicable to the Congressional investigatory power.

ii. *Question Under Inquiry.* Equally needful is this Court's review of the ruling below on the "question under inquiry" issue. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals.[17] Certainly, where the Committee, the

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[17] The Court of Appeals opinion suggests that petitioner failed to inquire of the Committee concerning the "question under inquiry" and that the Committee therefore had no obligation to make the point luminous to him. But prior to being sworn at the 1956 hearing, petitioner challenged the jurisdiction of the Committee on the grounds that it was clear that "the Committee will obtain no information from me that will assist it in any legislative purpose" and said, "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony" (Tr. 105). If such an initial challenge, followed by specific objection to the jurisdiction of the Com-

prosecution, the prosecution's evidence, and the findings of the courts on the "question under inquiry" are as diverse and contradictory as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Committee interrogation to meet constitutional and statutory requirements. As this Court stated in *Watkins* regarding the "pertinent to the question under inquiry" element of 2 U.S.C. § 192:

> "The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee. . . . It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vagueness' must be avoided here as in all other crimes" (208-209).

The present case is also foursquare with the *Watkins* holding (reiterated in the majority opinion in *Barenblatt*), that an authorizing resolution such as that of the House Un-American Activities Committee is not itself sufficiently precise to serve as a "question under inquiry" within the meaning of 2 U.S.C. § 192. In the District Court, the government, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) and *"no lesser inquiry"* as the question under inquiry to be proved. While both courts below sought to find a more limited inquiry—Communist influence on the

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mittee at the time of refusals to answer (Tr. 119-128), did not place upon the Committee the duty of enlightening petitioner as to the "question under inquiry", then a Congressional witness has truly become a pawn in a battle of legal niceties.

Times or in the press—the bill of particulars is, of course, binding for the proposition that no such limited inquiry was being pursued by the Committee in its interrogation of petitioner. See *United States* v. *Neff*, 212 F.2d 297, 309, and authorities there cited.[18] The only question that remains is whether Section (3) of Senate Resolution 366 (see *infra*, p. 58) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee's authorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical language of the Senate Resolution (see pp. 57-58, *infra*) is no more precise as a "question under inquiry" than is that of the House.[19] The holding of

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[18] The bill of particulars also undermines the Court of Appeals' suggestion that petitioner was able at the time of his interrogation to perceive some limited "question under inquiry", for if one year later, the Assistant United States Attorney preparing the case for trial could find no more limited question under inquiry than the broad authorizing resolution, it would indeed have been clairvoyance for petitioner to have perceived such a limited question the year before.

[19] In a companion case involving a Times employee (*United States* v. *Peck*, 154 F. Supp. 603, 609) Judge Youngdahl entered an acquittal, stating: "In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. The Senate did explicitly state, however, that the investigation was not limited to 'movement(s) seeking to overthrow the Government of the United States by force and violence.' But no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition." The Court added that at trial,

> "the Court rejected the government's contention that the question under inquiry was 'the full Committee powers' or the entire scope of the authorizing resolution. The Supreme Court *Watkins* decision would clearly require a reversal of Peck's conviction, had the Court found the subject under inquiry to be as broad and as vague as that which the government urged."

In another companion case, *Whitman* v. *United States*, the contempt citation was affirmed by the Court of Appeals for the District of Columbia Circuit on July 7, 1960, on the authority of the opinion below in the instant case.

Watkins on the "question under inquiry" is thus precisely applicable in the present case.

iii. *Freedom of the Press.* Additional reason for review is provided by the Committee's gratuitous trespass on First Amendment rights. While the hearing record is replete with self-serving protestations that the Committee was not investigating the press but merely Communist influence therein, the full record demonstrates the contrary. In its interrogation of thirty Times witnesses, the Committee certainly did not restrict itself to questions about Communist Party membership and activity, but frequently delved into the content of material appearing in the press. Indeed, there is ample evidence (see Tr. 207-244) that the New York Times was purposefully selected by Sourwine and Chairman Eastland as a Committee target.[20]

While it is a source of gratification that the New York Times retained petitioner in its employ, the loss in actual freedom of the press cannot be measured by the courage of its most powerful representative. The content of the press is, of course, shaped by persons who write the news. The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Committee could find on the New York Times is to discourage the Times and other newspapers from hiring persons of unpopular, unorthodox, or minority views and associations who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or once held unorthodox, unpopular, or minority views or

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[20] The New York Times itself so construed the hearings in a notable editorial "The Voice of a Free Press" (Tr. 232), in which it found it "quite obvious that the Eastland investigation has been aimed with particular emphasis at the New York Times." The editorial called upon the "inescapable responsibility of Congress" to insure that inquiries of the press "be conducted in good faith and not motivated by ulterior purpose."

associations is as effective a form of censorship as the deletion of the material they contribute to the press. But absent a clearly defined "question under inquiry," it is impossible for the witness, the Committee, or the courts, to make the delicate weighing between governmental interest and First Amendment rights which this Court's *Watkins* and *Barenblatt* decisions require. The undeniably repressive effect upon First Amendment freedoms of a hearing such as the 1956 New York Times inquiry thus underlines the importance of holding Congressional hearings to accepted constitutional and statutory standards of procedural fairness.

iv. *Additional Questions.* Three further questions worthy of this Court's review are presented in this case:

First, contrary to the ruling of the Court of Appeals for the Second Circuit in *United States* v. *Lamont*, 236 F.2d 312, the court below held than an indictment under 2 U.S.C. § 192 for failing to answer questions pertinent to the "question under inquiry" need not set forth the actual "question under inquiry" involved. But it seems clear that the minimal notice function of a criminal indictment is not fairly met when it fails to set forth so significant an element of the offense. A likely result of the omission is illustrated in the instant case, where the Government at the outset of the trial, the Government's witness at the trial, and the courts below, all adopted differing views of the "question under inquiry."[21]

Second, the court below rejected, *sub silentio*, a point on which this Court granted certiorari in *Quinn* v. *United States*, 347 U.S. 1008, and *Watkins* v. *United States*, 352

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[21] The failure to set forth in the indictment the question under inquiry to be proved was doubly prejudicial in this case since the Government at the trial failed to adhere to the bill of particulars which it was directed to give petitioner.

U.S. 822, whether when by proper motion and affidavit grounds for belief are set forth that by virtue of fear and bias federal employee grand jurors were disabled from properly exercising their function, the defendant is entitled to a dismissal of the indictment or a preliminary hearing thereon. While the issue was not reached in *Quinn* or *Watkins*, nothing has occurred since this Court's grants of review in those cases which has made the question as to the impartiality of the grand jury any less significant.

Finally, it appears clearly improper for the District Court to have separately fined petitioner $250 on two counts, both based upon failure to answer questions falling in the same generally defined area in which he had indicated his refusal to testify. This Court has held that the prosecution in a court proceeding cannot multiply the "contempt" (and consequently the punishment) by multiplying the questions which it knows the witness will not answer. *Yates* v. *United States*, 355 U.S. 66. Whether or not the same salutory rule should apply to Congressional witnesses is certainly an appropriate question for this Court's consideration.

Conclusion

In recent terms of this Court it has been called upon to define how far due process provides procedural safeguards to witnesses in Congressional investigations. The degree to which the closely related Fourth Amendment safeguards provide protection against unreasonable or arbitrary subjection of the citizen to Congressional interrogation has not, however, received clear delineation. Yet it is precisely because of the nature of Congressional investigations that the Fourth Amendment assumes critical importance, for once within the investigative hearing room, the witness has but limited protections, without many of the

rights which attend adjudicatory inquiries. Equally significant, once subpoenaed, the witness is subjected to a wide range of inquiry into belief, association and conduct in one of the most sensitive areas of constitutional liberty. But if the ruling below stands unreversed, then Congressional committees may subpoena the "man off the press" or the "man off the street," to inquire concerning Communist activities, without reason to believe that he possesses information on the subject. Dragnet inquisition has then been added to the armory of Congressional investigating power.

It is respectfully submitted that this case presents in most compelling fashion fundamental issues concerning Congressional investigatory procedures, issues related to those involved in the grants of certiorari in No. 33, *McPhaul* v. *United States;* No. 37, *Wilkinson* v. *United States;* and No. 54, *Braden* v. *United States*. Accordingly, certiorari should be granted and the case set for argument with those cases.

Respectfully submitted,

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APPENDIX A

Opinion of District Court, January 18, 1957

Joseph L. Rauh, Jr., and John Silard of Washington, D. C., for the defendant.

Oliver Gasch, United States Attorney, and William Hitz, Assistant United States Attorney, of Washington, D. C., for the United States.

It is charged by indictment in three counts that the defendant, Robert Shelton, in contempt of the lawful powers of Congress and contrary to law,[1] refused on January 6, 1956, to answer certain pertinent questions propounded to him by the Senate Subcommittee on Internal Security[2] while under oath and appearing as a witness to testify in connection with an inquiry then being conducted by the Subcommittee pursuant lawful authority.

It is the Government's position that the Subcommittee, while in the lawful exercise of the powers and duties conferred upon it by the pertinent resolutions,[3] caused the defendant to appear before it on the 7th day of December, 1955, in New York City, and again on the 6th day of
385 January, 1956, in Washington, D. C., to testify concerning his knowledge of matters pertinent to the subjects then under investigation and study by the Subcommittee in furtherance of the Congressional responsibilities in such areas of national concern. It is further asserted that upon appearing before the Subcommittee on January 6, 1956, defendant refused to answer pertinent interrogatories, including the following questions, when ordered and directed to do so by the presiding officer of the Subcommittee:—

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[1] 11 Stat. 155, as amended, R.S. Section 102; 52 Stat. 942 2 U.S.C. Sect. 192.

[2] The Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate.

[3] Legislative Reorganization Act of 1946, Sect. 102(1)(k), (60 Stat. 818); Senate Res. 336, 81st Congress 2nd Session (1950); Senate Res. 58, 84th Congress, 1st Session (1955); and the Standing Rules of the U. S. Senate.

Count One: "Are you, sir, a member of the Communist Party, U.S.A.?"

Count Two: "Did you ever have any conversation with Matilda Landsman?"

Count Three: "What did you tell them?"

Defendant does not question the Government's proof that, on the date and in the place alleged in the indictment, he appeared before the Subcommittee as a witness and while under oath, and after being ordered and directed by the presiding officer to do so, refused to answer the questions set out in counts one through three of the indictment. Defendant does not interpose the Fifth Amendment to the United States Constitution in justification of his refusal to answer the questions insofar as such constitutional provision prohibits compulsory self-incrimination. It is defendant's position that the evidence before this Court shows that he was justified in refusing to answer the questions because the Subcommittee was acting in excess of its lawful authority (1) in calling him at all; (2) by the Government's failure to prove that any precise "question" within the authority of the subcommittee was under inquiry at the times in issue; (3) by the Government's failure to prove that the hearing before the Subcommittee on January 6, 1956, was pursuant the authority set out in the indictment; (4) by the Government's failure to prove that the interrogation of defendant had any legislative purpose;
386 and (5) that the statute defining the offense defendant is charged with committing, read in conjunction with the enabling resolutions of the Subcommittee, is so vague and indefinite as to deprive the defendant of due process of law.[4]

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[4] Defendant filed his "Motion for Judgment of Acquittal", urging ten grounds therefore as follows, which points can be fully discussed under the contentions enumerated in the body of this opinion:—

"1. The Government has failed to prove what, if any, was the question under inquiry by the committee when it called defendant.

"2. The Government has failed to prove that the questions asked defendant were pertinent to any question under inquiry by the committee.

"3. The Government has failed to prove that the question under in-

387 The defendant is not required to adduce evidence of his innocence in the absence of proof by the Government which establishes the enumerated elements of the charged violations beyond a reasonable doubt. In criminal prosecutions for contempt of Congress, as in every criminal prosecution, the defendant is presumed to be innocent of the charges upon which he is indicted. And such pre-

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quiry by the committee, when it called defendant, was within the authority alleged in the indictment.

"4. The Government has failed to prove that on January 6, 1956, the subcommittee in question was conducting hearings pursuant to the specific authority alleged in the indictment or to any other grant of power from the United States Senate.

"5. The Government has failed to prove that the questioning of defendant and the questions which form the basis of the indictment had any valid legislative purpose. The evidence indicates that in fact the committee had no valid legislative purpose in interrogating defendant but rather sought to expose him and others to contempt and ridicule in violation of the constitutional doctrine of separation of powers which places limitations upon the exercise of legislative power.

"6. The questioning of defendant and the questions which form the basis of the indictment violated the rights of defendant and others to the freedom of speech, assembly and petition guaranteed by the First Amendment.

"7. The questioning of defendant and the questions which form the basis of the indictment violated the freedom of the press guaranteed by the First Amendment.

"8. At the time that defendant was questioned, the committee had no information that he was or had been a Communist or a member of a Communist front organization nor any other information reflecting adversely upon him. The information in the possession of the committee reflected upon Willard Shelton, a well known newspaperman rather than upon the defendant, who was called entirely by accident. Under these circumstances, the proceedings violated defendant's rights of privacy under the First Amendment and were not within any legislative power granted to or exercisable by the committee.

"9. Defendant's rights under the Fourth and Fifth Amendments were violated by arbitrary and discriminatory subpoenaing of defendant as a witness before the committee when there was no probable cause to believe that defendant had engaged in or had information about Communism, subversion, espionage or other matters within the alleged jurisdiction of the committee.

"10. 2 U.S.C. 192, read together with the alleged authorization of the subcommittee, is so vague and indefinite as to deprive defendant of the due process of law guaranteed by the Fifth Amendment.

sumption remains with this defendant until such time as the Government proves beyond a reasonable doubt that, as to each count of the indictment, the defendant, while appearing as a witness before a duly authorized Congressional committee,[5] was directed and ordered to answer the interrogatory set out; that the specific question was pertinent to matters within the jurisdiction of the Committee then under investigation; that the investigation was in furtherance of a proper Congressional purpose; and that the defendant refused to answer such interrogatory when so ordered and directed to do so. Quinn v. United States, 349 U.S. 155 (1950); Bowers v. United States, (C.A. D.C. 1953) 202 F. 2nd 447.

To establish the authority of the subcommittee, the Government introduced the enabling resolution, Sen. Res. 366, 81st. Cong. 2nd Sess., 1950, which conferred original authority upon the Senate Judiciary Committee, or any duly authorized subcommittee thereof, directing such bodies "to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, * * *, including, but not limited to espionage, sabotage, and infiltration by persons who are or may be under the domination of
388 the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." In addition thereto, the Government introduced the resolution continuing such original authority in the Judiciary Committee, or its duly authorized subcommittees, with provisons for expenditures during the 84th Congress,[6] and copies of the minutes of

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[5] The word "committee" is used in its generic sense to include "subcommittee". Barenblatt v. United States, (C.A.D.C. No. 13,327) decided January 3, 1957; United States v. Knowles (D.C.D.C. No. 1211-56 Criminal) decided January 10, 1957.

[6] Senate Resolution 58, 84th Congress, 1st Session, 1955.

Senate Committee on the Judiciary for January 20, 1955, wherein the subcommittee in question was by resolution continued during the 84th Congress,[7] as well as a copy of the minutes of the Senate Committee on the Judiciary for February 7, 1955, listing the names of the Senators appointed to serve upon the Subcommittee on Internal Security. The copies of the minutes of the Committee were received in evidence as a part of the official records of the subcommittee over the objection that they showed no authority in the subcommittee.

The Government introduced the certification of the defendant's contempt by the United States Senate to the United States Attorney for the District of Columbia, the Senate Resolution ordering such certification, and a copy of Senate Report No. 1934, 84th Congress, 2nd Session (1956), which sets out the proceedings before the subcommittee giving rise to the citation. The documents are in proper form and neither their authenticity nor regularity is questioned.

Mr. Julius G. Sourwine appeared as a witness for the Government. His testimony disclosed that at the times in question he was Chief Counsel for the subcommittee and personally familiar with the facts and circumstances leading up to defendant's appearances before that body.

389 In substance the witness testified that the subcommittee had information indicating the existence of Communist activity in newspaper and publishing fields in New York City, implicating one Matilda Landsman as being active in the Communist Party and the Typographical Union in that city. Additionally, the witness alluded to confidential information in the possession of the subcommittee which provided names of several suspected Communists employed in various capacities by certain newspapers, including the company which at that time employed Matilda Landsman and this defendant. The witness testi-

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[7] "RESOLVED, by the Committee on the Judiciary, That the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a Special Subcommittee of the Committee on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose."

fied that the subcommittee did not have any information indicating that this defendant was either a Communist or had engaged in Communist activities. The subcommittee did, according to the witness, have information that one "Shelton," who was employed in the "news" side of a particular newspaper, was informed, if not active, in Communist infiltration into the newspaper media of mass communication.

Upon the basis of such information the subcommittee late in 1955, held an executive session in New York City, in connection with which a summons was issued to one "Willard Shelton" at a specific address, requiring his attendance on November 23, 1955, at a time and place certain. The evidence was that the name "Willard" had been affixed upon the summons by error, for in fact the subcommittee did not possess the first name of the "Shelton" linked by name to the subversive activity it sought to investigate and study. There is evidence in the record upon the manner in which the defendant's name came to be added to this summons, but the view the Court takes of this subject is that it has no relevancy to this case or any of the issues in it. This is true for the reason that the defendant did not initially appear before the executive session of the subcommittee pursuant the disputed summons. The summons served upon the defendant requiring his attendance before the subcommittee on December 7,
390 1955, was issued on November 23, 1955, by James O. Eastland, "Chairman, Committee on the Judiciary, and Internal Security Subcommission," to Thomas J. Lunney, United States Marshal, Southern District of New York, who according to his official return thereof recited the service of the summons on the defendant by leaving a copy thereof with him at his place of employment on November 29, 1955.[8]

The official transcript of the proceedings before the subcommittee involving this defendant was admitted into evidence without objection. It clearly shows beyond any reasonable doubt that at the time and place alleged in the indictment the defendant appeared before the subcommit-

[8] Senate Report No. 1934, 84th Congress, 2nd Session (1956) p. 2.

tee, was sworn as a witness, ordered and directed to answer the three questions set out in the counts of the indictment, and refused to do so. The contentions of the defendant are urged in justification of this established conduct.

Defendant's contention that the subcommittee exceeded its authority in calling him as a witness under the circumstances of this case is grounded upon several propositions. The technical objections arising from the issuance, service and return of the summons were predicated upon the apparent belief the the summons originally issued to "Willard Shelton" was the process relied upon to bring the defendant initially within the jurisdiction of the subcommittee. As previously pointed out, the official transcript of the proceedings before the subcommittee which involve this defendant commenced on November 23, 1955, with the issuance of a summons which was personally served on the defendant pursuant lawful authority on November 29, 1955, and return thereof properly executed that same day. The summons requiring defendant's attendance before the subcommittee is sufficient on its face to bring him within the jurisdiction and authority of the subcommittee, and the Court so holds.

391 Defendant's contention that the subcommittee exceeded it's authority in summoning him under the facts of this case rests upon his interpretation of the First Amendment to the United States Constitution. It is the position of the defendant that the authority of Congress to require the attendance of witnesses before it's duly authorized committees, investigating matters within the legislative powers of Congress, is limited by the individual citizen's right of privacy guaranteed by the First Amendment. It is then argued that where a committee seeks to summons a witness for the purpose of taking testimony there must exist a "probable cause" for the committee to believe that such person possesses pertinent information on the subject under lawful investigation or such summons is without force or effect.

Proceeding upon the assumption that "probable cause", in the sense employed by defendant is required for issuance of a valid summons by the Congress, it is argued that the only evidence of "probable cause" in this case for the

calling of this defendant as a witness was contained in the confidential letter linking the name "Shelton" with the subject under inquiry. This line of argument was relied upon in an effort to secure the confidential letter from the files of the subcommittee for inspection and introduction into the record as the "best evidence" of "probable cause". The Government objected to the request for the letter on the grounds that it is not material or relevant to issues of the case; it contains confidential information including the names of additional persons known or suspected to be active in the Communist movement; it contains the pseudonym of a confidential informant of the subcommittee.

The Court carefully considered defendant's contention respecting the requirement of "probable cause" for issuance of a Congressional summons, and the relevancy of the confidential letter to the issues of this case. The application for production of the letter was denied at trial and

392 the Court is convinced that such ruling was proper in light of the law applicable to this case and the nature of the letter, as well as it's relevancy, in this matter.

The Court has examined at length the authorities bearing upon the extent of the investigative powers of the Congress. The extent of the power has been defined in authoritative decisions by the Supreme Court written after prolonged deliberation.[9] There can be no doubt about the power of Congress, and it's committees, to investigate as a necessary attribute of the duty and authority to legislate. *McGrain* v. *Daugherty, 273 U.S. 135 (1927); Sinclair* v. *United States, 279 U.S. 263 (1929)*. And, such investigative power has been characterized as being "co-extensive with the power to legislate"[10], subject to the limitations imposed by the Fifth Amendment to the United States Constitution[11] and the right of privacy in matters unrelated

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[9] The Court was two years in deciding and writing the opinion in McGrain v. Daugherty, 279 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927).

[10] Quinn v. United States, 349 U.S. 155 (1955).

[11] United States v. Rosen, 174 F.2d 187 (2nd Cir. 1949), cert. denied 338 U.S. 851.

to a valid legislative purpose.[12] There is a complete want of precedent for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress, in conducting an inquiry for a legitimate legislative purpose, by permitting such committee, and hence Congress itself, to compel the attendence and testimony of only such witnesses as the Courts might judicially determine were "reasonably expected to be in possession of pertinent information." The doctrine of "separation of powers" and a rightful regard for the authority of the legislative branch of government refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress which alone is responsible for the exercise of the authority from which the disputed power arises.

393 The established limitations upon the Congressional investigative powers, which require a legislative purpose and inquiries pertinent thereto, provide ample protection to the private affairs of witnesses appearing before duly authorized committees of the Congress. *Barsky* v. *United States, (C.A.D.C. 1948) 167 F.2d 241, cert. denied, 334 U.S. 843 (1948); Quinn* v. *United States, supra.; Barenblatt* v. *United States, (C.A.D.C. 1957) No. 13,327, decided January 3, 1957.*

Beyond the fact that the Court does not find judicial power to determine what witnesses Congress may call in furtherance of it's legislative purposes and compel pertinent testimony thereon, the record of this case discloses beyond any reasonable doubt that the subcommittee had information in it's possession at the time defendant was initially summoned to appear before it which established a "reasonable cause" for requiring his testimony. The subcommittee had information, apart from the confidential letter which indicated Communist infiltration into the New York Typographical Union and elements of the New York newspapers, including the one by which defendant was employed. In light of these facts, it was not only reasonable for the subcommittee to call the defendant and other employees from the press organization at which he worked,

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[12] Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1880).

such a procedure by the subcommittee appeared expedient in furtherance of its express duties. Cf. Watkins v. United States, 233 F.2d 681 (C.A.D.C. 1955) cert. granted 77 S.Ct. 62 (1956); Barsky v. United States, *supra.*

The legislative purpose underlying the investigation and studies committed by the Senate to the committee is concisely expressed by the enabling resolutions. Legislation in the field of foreign subversion and infiltration by subversives in this country is clearly within the Congressional authority. *Barenblatt* v. *United States, supra; Barsky* v. *United States, supra.*

394 The defendant's contention that the Government failed to establish that any precise question, within the authority of the subcommittee, was under inquiry at the time in issue, is not established by the evidence in this case. The statement of the Chairman of the subcommittee at the commencement of the hearings in which defendant appeared in Washington, D. C., and testified, clearly show that the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies.[13] Such an inquiry is manifestly within the duties imposed upon the subcommittee by the enabling resolutions, and the authority of the subcommittee is measured by only the enabling resolutions creating it and charging it with specific duties.[14] The scope of a given hearing by a duly authorized subcommittee must be confined to those matters fairly within the delegated authority; beyond that, the subcommittee is not confined to a categorical subject within the area delegated to it pursuant law. *Cf. United States* v. *Knowles, (D.C.D.C. 1957) No. 1211-56 Criminal, decided January 10, (1957).* The Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media and was within the authority

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[13] Government Exhibit 7, pp. 1587-1589, *"Strategy and Tactics of World Communism,* Part 17.

[14] The authority of the Congress, and hence any of it's Committees, is at all times limited during investigations by the requirements that the investigation be in aid of legislation and the questions propounded pertinent to the subject matter under inquiry. *Quinn* v. *United States, supra.*

of the subcommittee. The Court also finds that defendant was fully aware of the precise subject under inquiry by the subcommittee at the time of his appearance before it in Washington, D. C., as evidenced by his prepared statement objecting to the jurisdiction of the subcom-
395 mittee.[15]

Defendant's contention that the hearing before the subcommittee on January 6, 1956, was not shown to have been pursuant the authority set out in the indictment is contrary to the evidence. The Government placed the pertinent resolutions and minutes in the record. These documents show the original authority of the Committee on the Judiciary from the United States Senate (Senate Res. 366, 81st Congress, 2nd Session), the continuation of that committee's original authority to the time in question, and the authority of the subcommittee, as well as it's composition, at the time in question. This evidence is adequate in all respects to show the authority of the subcommittee to act in the premises beyond a reasonable doubt.

The contention of the defendant that the hearing at which he testified and from which the indictment arose was not in furtherance of a legislative purpose proceeds on the assumption that a failure to have specific legislation in contemplation, or a failure to show that legislation was in fact redacted, establishes an absence of legislative purpose. This argument is patently unsound. The investigative power of Congress is not subject to the limitation that hearings must result in legislation or recommendations for legislation. See In re Chapman, 166 U.S. 661 (1897); Townsend v. United States, (C.A.D.C. 1938) 95 F. 2d 352; Barsky v. United States, (C.A.D.C. 1948), *supra*. The evidence defendant introduced to support his contention that a non-legislative purpose prompted the subject hearings is wanting in probative value and wholly insufficient to cast a doubt upon the true Congressional purpose underlying the delegation of the authority to the subcommittee or the purpose of the subcommittee in conducting the hearing in question. Indeed, where the subcommittee pro-

[15] Senate Report 1984, 84th Cong. 2nd Session, pp. 12, 14-16.

ceeds within the authority lawfully delegated to it by Congress, it would appear doubtful that want of legislative purpose could be established. *Cf. United States* v. *Josephson*, (*2nd Cir. 1947*) *165 F.2d 82, 89, cert.* 396 *denied 333 U.S. 838, 68 S.Ct. 609, 92 L.Ed. 1122 (1948)*; *Barsky* v. *United States, supra.* The Court finds that the hearings in question were, beyond a reasonable doubt, conducted in furtherance of a legislative purpose and within an area subject to the legislative powers of the Congress. *See Barenblatt* v. *United States, supra.*

The statute under which defendant is charged [16] is said to be so vague and indefinite, when read in conjunction with the enabling resolutions defining the authority of the subcommittee, as to deprive a defendant appearing before the subcommittee of due process of law. The statute in question has been judicially construed in many cases, the meaning to be attached to the words appearing in the provision is clear.[17] The statute itself is neither vague nor indefinite in it's proscriptions and mandates.

Where a witness appearing before a committee of the Congress is fully apprised of the extent of the authority of the body, and is in fact fully apprised of the precise subject, within the committee's authority, which is then under inquiry, as was the defendant in this instance, the duty of the witness is clear. Any question pertinent to the matter under inquiry must be answered, except insofar as the Fifth Amendment may provide justification for a refusal to answer. *United States* v. *Rosen, supra.; Quinn* v. *United States, supra.* The contention of statutory vagueness is without merit.[18]

The question which constitutes Count Three of the indictment is not pertinent to the subject established by the evidence to have been under inquiry at the time defendant testified. This count of the indictment will therefore be dismissed. Upon the evidence adduced at trial, it is the

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[16] Title 2, United States Code Section 192, 52 Stat. 942 (1946).

[17] *Merry, The Investigating Power of Congress, 40 A.B.A.J. 1073 (1954).*

[18] Cf. Watkins v. United States, (C.A.D.C. 1956) 233 F.2d 681, cert. granted 77 S. Ct. 62 (1956).

judgment of the Court that the defendant is guilty as charged in Counts One and Two of the Indictment
397 beyond a reasonable doubt. The verdict will be entered, the present bond of the defendant continued pending sentence. The cause will be referred to the Probation Officer for investigation and report, upon completion of which defendant will be advised of the date to appear for sentencing.

ROSS RIZLEY,
United States District Judge.

January 18, 1957.

Opinion of Court of Appeals, June 18, 1960

Before WASHINGTON, BASTIAN and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge*: This is an appeal from conviction and judgment after trial in the District Court for contempt of Congress growing out of refusal to answer questions asked by the Senate Internal Security Subcommittee.*

Shelton, a copy editor of a New York newspaper, was subpoenaed and appeared, first in executive session in New York City on December 7, 1955, and later in open sessions of the Senate Internal Security Subcommittee in Washington, about a month later. At both hearings he refused to answer questions on the subject of membership in the Communist Party and as to whether he had ever had conversations with a certain named person identified by the Committee as a Communist. He was convicted for contempt on two counts for refusal to answer questions.[1] At Shelton's request he was tried without a jury.

The Subcommittee was operating under a Senate Resolution adopted in 1950,[2] and continued thereafter,[3] which empowered it to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection

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* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

[1] These questions were:

(1) "Are you, sir, a member of the Communist Party, U.S.A.?"

(2) "Did you ever have any conversation with Matilda Landsman?"

[2] S. Res. 366, 81st Cong., 2d Sess. (1950).

[3] S. Res. 7, 82d Cong., 1st Sess. (1951); S. Res. 198, 82d Cong., 1st Sess. (1951); S. Res. 314, 82d Cong., 2d Sess. (1952); S. Res. 46, 83d Cong., 1st Sess. (1953); S. Res. 172, 83d Cong., 2d Sess. (1954); S. Res. 40, 84th Cong., 1st Sess. (1955); S. Res. 58, 84th Cong., 1st Sess. (1955); S. Res. 209, 84th Cong., 2d Sess. (1956); S. Res. 174, 84th Cong., 2d Sess. (1956).

of the internal security of the United States; and (3) the extent, nature and effect of subversive activities in the United States, including, but not limited to, espionage, sabotage, and infiltration by persons under the domination of the foreign government or organizations controlling the World Communist movement seeking the overthrow of the United States Government by force and violence.

Under this Resolution the Subcommittee had previously heard testimony from one Winston M. Burdett, a well known journalist, foreign correspondent and newscaster, who had been a member of the Communist Party from 1937 to the early 1940's. Burdett cooperated fully with the Subcommittee and gave information including names of persons with whom he had worked; he did not refer to appellant. Later the hearings involved in this case were called as part of a program "to pursue every lead which developed out of the Burdett testimony."[4]

Some time before appellant was first subpoenaed to appear the Subcommittee had received a letter stating that one "Shelton" who worked for the New York Times was informed about if not active in a "Communist Group" and knew of the Communist Party activities in newspapers. The author of the letter was not identified in the record but there was testimony that he was known to the Subcommittee as a source of reliable information on other occasions. Thereafter a subpoena was issued addressed to "Willard Shelton." In attempting to make service the process server learned that there was no "Willard" Shelton employed by the New York Times, but that a "Robert" Shelton was employed as a news copy editor. The Subcommittee then authorized amendment of the subpoena to add the words "or Robert Shelton," and it was served on Robert Shelton, appellant here.

The record indicates that at the outset of appellant's appearance before the executive session, the Subcommittee was uncertain whether appellant was indeed the per-

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[4] Hearings before the Senate Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, 84th Cong., 2d Sess., pt. 17, at 1587 (1956).

son they thought to be in possession of information about Communist Party activities in newspapers generally or in his own newspaper. He was interrogated as to his background in order to clear up the question of identity, and in the course of that interrogation was asked and refused to answer substantially the questions set out in the margin, footnote 1. He was recalled 30 days later when the Subcommittee was holding public sessions.

At the opening of the public hearings in Washington on January 4, 1956, the Chairman pointed up the purpose of the inquiry, stating that the Subcommittee "could not be unmindful . . . that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration."[5] Early in the hearing Senator Hennings, a member of the Subcommittee, stated:

> . . . that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.[6]

The Subcommittee thus defined the general area of this series of hearings.

Immediately before appellant was called to the stand at the January 6 session, Senator Hennings also commented in part:

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations

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[5] *Ibid.*

[6] *Id.* at 1588.

of efforts of the Communist Party to infiltrate newspapers or other media of communication. . . .

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. . . And I do think in the interest of justice and in the interests of preserving the integrity and the high standing of this committee, we should be particularly cautious and aware of the possibility of unnecessarily calling one before us who may have nothing to add to the general subject matter of our inquiry and who may be seriously damaged in his own personal and professional life.[7]

The Chairman at the same time referred to a telegram from the Long Island Press asking the Subcommittee to do what it could to emphasize that it had led in efforts to expose Communist infiltration of the press and that it was supporting the Subcommittee's work. The Chairman commented: "The committee is not investigating the Long Island Press or any other newspaper. We are aware of the fact that the Long Island Press was alert to the danger of the Communist infiltration from a very early date and was aggressive and effective in combating this danger in its own organization."[8] Upon being called to take the stand at this point appellant challenged the Subcommittee's power to call him as a witness.

Shelton was then asked the questions set forth in the indictment and he refused to answer. He was duly cited for contempt for his refusal and upon being tried was found guilty as charged. Appellant did not rely on the Fifth Amendment to the Constitution as a reason for his refusal to answer questions.

Appellant urges numerous errors in the proceeding below. Briefly stated, they are:

(1) That Part 3 of Senate Resolution 366 is too vague and imprecise to authorize or permit the Subcommittee to compel answers.

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[7] *Id.* at 1718-19.

[8] *Id.* at 1718.

(2) That appellant could fairly refuse to answer the questions since he was not told the "subject under inquiry," as required.
(3) That the pertinency of the questions to the subject matter was not explained.
(4) That the very nature of the questions violated appellant's First Amendment rights.
(5) That the indictment was faulty in failing to set out the "question under inquiry."
(6) That appellant need not answer any questions as the Subcommittee did not have "probable cause" to call him.

(1) The challenge to Senate Resolution 366, Part 3, as too vague to authorize the Subcommittee to compel answers to any questions must fall for several reasons. The Resolution as a whole and Part 3 in particular is more explicit than the House Resolution sustained by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959). The criticism of vagueness seemingly directed at the House Resolution in *Watkins* v. *United States*, 354 U.S. 178 (1957), does not in any event apply to Senate Resolution 366. In the recent *Barenblatt* case the Supreme Court confirmed the power of Congress to investigate activities of this character. Since its creation the Subcommittee has devoted itself to investigating subversive activities and Communist infiltration in many phases of American life, including infiltration in key industries, in television, radio and the press. Congressional awareness and approval of the work of the Committee can be found in numerous reports to the Congress by the parent Committee, and in repeated appropriations for its work.[9] In one report to the Senate the Committee specifically referred to the so-called "Burdett hearings" and other sessions in New York, relating to Communist efforts to infiltrate newspapers.[10] Whatever may have been argued at one time as to possible infirmities or vagueness in

[9] See note 3, *supra*.

[10] Report of the Subcommittee on Internal Security to the Committee on the Judiciary for 1955, S. Rep. No. 1385, 84th Cong., 2d Sess., at 4 (1956).

Resolution 366 under which the Committee was acting, the *Barenblatt* case and the legislative gloss attached to the Resolution has put this issue to rest.

(2) Appellant contends he was not informed of the subject or topic under inquiry and hence could not fairly decide whether he could be compelled to answer. The record discloses that at the opening of the hearings the investigation was expressly described as directed at the efforts and activities of the "international Communist conspiracy" to influence American public opinion through the press. Senator Hennings also stated the hearings were for the purpose of showing "such participation and such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press."[11] In a colloquy with the Chairman only moments before appellant took the stand, Senator Hennings restated the same idea in these words "this committee has the right to inquire into all efforts, or indeed all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication."[12] Thus the subject matter was explained with the required clarity so that appellant could fairly evaluate the risks of refusing to answer. That the explanations given by the Chairman and Senator Hennings varied in terms did not in any way impair the clarity of the explanation. The broad subject matter of Communist Party infiltration and subversion, the narrower subject of efforts to influence American public opinion and the specific effort to use the press to implement these objectives were spelled out with utmost clarity not only in the remarks of the Subcommittee members but also in the context of the hearings. In the course of the hearings to pursue the "Burdett testimony" 18 persons connected with communications media were called.[13] The interrogation of these witnesses

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[11] See note 6, *supra*.

[12] See note 7, *supra*.

[13] Six news reporters, one newspaper indexer, one motion picture exhibitor, an ex-bookseller, one newspaper proofreader, one magazine editor, two linotype operators, one copy editor, two news copyreaders, one ex-journalism professor, one newspaper education editor.

was directed at Communist activities in the press and communications field generally.

Moreover appellant's statement of objections to being questioned and his responses reveal his complete awareness of the subject matter of the inquiry. A great part of the statement [14] is concerned with the dangerous con-

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[14] "The question also threatens freedom of the press as guaranteed by the first amendment. I believe no other governmental body in the free world would call a newspaperman and demand to know his political beliefs and associations. However unknowingly or unwittingly, gentlemen, in the quest for internal security, you are threatening long-standing and hard-won American liberties. The Supreme Court has held that—

• • • the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate • • •

A body is the sum of its organs, a machine the sum of its parts. An attack on the smallest component of a body or machine is an attack on the whole. An invasion of my individual rights is an invasion of the rights of the paper that employs me and an invasion of the rights of the newspaper profession as a whole. This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work. This subcommittee is engendering the fear that soon it will be looking into newsrooms all over the country.

If, as a result of my being called here, I am put under mental pressure to change one word or one sentence in material that I edit, an abridgment of freedom of the press will have taken place. Demanding to know what is going on in the mind of a newspaperman without inhibiting a free press is impossible. Your question acts as a form of 'prior restraint' on publishing, telling newspaper executives who should or who should not be on their staffs.

A journalist's credo I wholeheartedly support is 'to give the news impartially, without fear or favor, regardless of any party, sect, or interest involved. • • •' But by being called before you to answer about my political beliefs and associations I am placed in fear of having my loyalty considered suspect if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek your favor to guard my personal integrity, and that of the paper for which I work. . . .

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Let, me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote the maintenance of a press that is free and unfettered and unafraid; a press and newspapermen that will criticize what they please and support what they please. It is a rightful role of the press to be a watchdog over government. It is not a rightful

sequences which the Committee's investigation would have on the freedom of the press. There is no difficulty in discerning his belief that a newspaperman should be immune from questions of the kind he refused to answer. While he was firm and clear in arguing that the questions were beyond the scope of the Committee's authority and that he was protected from inquiry by the First Amendment, he at no time asserted that the subject matter of the inquiry was too vague. Apart from the demonstrated clarity of the topic, we note that appellant sought no explanation of subject matter as he was entitled to do.

Significantly, here, as in the *Barenblatt* case, appellant's refusal to answer related to his own Communist Party affiliation, rather than the activities or membership of others. As in *Barenblatt*, the Subcommittee had a right to know if the witness was a member of the Communist Party, for that identification rendered more meaningful any testimony given by him concerning his own activities or concerning the presence or absence of Communist Party efforts to infiltrate the press. An inquiry into a possible conspiracy for infiltration or subversion of the press embraces the right to command the witness to say whether he is a member of the conspiracy, subject, of course, to the right of the witness to take refuge in the Fifth Amendment. *Barsky* v. *United States*, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

We find no substance in the contention that appellant was not aware of the topic and subject under inquiry.

(3) While appellant challenged the Subcommittee's authority, he did not, as we have noted, ask that the subject be stated. Nor did he object to the questions on the grounds of pertinency. In response to a challenge to the authority of the Subcommittee the Chairman advised appellant that the questions were directed at whether he was a part of the Communist conspiracy[15] then under

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role of government to be a watchdog over the press. Let the reader at his breakfast table be the judge of whether a paper suits him or not, and by extension, whether the men who produce that paper suit him." S. Rep. No. 1934, 84th Cong., 2d Sess., 15, 16 (1956).

[15] See Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948).

investigation. The second count question involved whether he had any knowledge as to a Communist attempt to infiltrate Typographical Union No. 6, and whether he had ever discussed with Matilda Landsman the question of Communist activity in that union. Matilda Landsman was known to the Subcommittee as an employee of the New York Times who had, on directions of the Communist Party "downgraded" her job from news work to the press room in order to carry out "missionary" or "colonizing" work in the typographical employees. We hold that the pertinency of the questions was revealed by their context and that no additional explanation of pertinency was called for absent an objection to the question on that ground. No particular form or words are required to raise that objection but the interrogators must in some way be made aware that the witness objects to or is in doubt about the relationship of the question to the subject under inquiry. Applicant failed to do this, hence there was no duty on the Subcommittee to say more.[16]

Moreover the *Watkins'* standard on this score is qualified:

> *Unless* the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection* of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. (Emphasis added.) 354 U.S. at 214-15.

This definition makes plain that if the subject matter has been made clear no explanation need be given, absent objection or request. In other words, *two* things must coincide to require an explanation as to pertinency: (1) that the subject matter be *unclear*, and (2) the witness must object.

(4) Essentially appellant argues that as a newspaper-

[16] We note in passing that with respect to certain questions at both the executive and public sessions appellant frequently made objections explicitly on pertinency grounds. See S. Rep. No. 1934, *Supra* note 14, at 4, 8, 13, 18. None of these questions formed the basis of his conviction.

man he has a special immunity from questions as to possible membership in the Communist Party. He argues that this investigation was directed at his newspaper to discourage all "newspapers from hiring persons of unpopular, unorthodox or minority views and associations . . . ." This, it is argued, results in "elimination of persons from the press who hold or once held unorthodox, unpopular or minority views or associations [and] is as effective a form of censorship as the deletion of the material they contribute to the press." Appellant's Brief, p. 32. This First Amendment argument is, in large part, that any inquiry such as this, directed to a member of the press is an impairment of the freedom of the press because it tends to intimidate all those engaged in that activity. But this inquiry was in no sense an investigation into the press as such, but into the question whether the constitutionally guaranteed freedom of the press was being used to undermine that very freedom and the foundation on which it rests. *Barenblatt* authorizes such inquiry. The investigatory power of Congress flows from the right of the government to preserve itself and its institutions. The important right of the press to be free and independent is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures. Indeed in the *Barenblatt* opinion in response to a similar argument the Court sharply pointed out that "investigatory power in this domain is not to be denied Congress solely because the field of education is involved." 360 U.S. at 129. Similarly, appellant's profession as a newspaperman does not preclude inquiry into his activities as a possible member or in behalf of the Communist Party. See *Barsky* v. *United States, supra.* Inquiry into generally protected areas must be subject to careful judicial scrutiny but the rights are not protected absolutely and they must yield to the superior right of Congress to know whether there is a dangerous abuse of those rights.

(5) Appellant urges that his conviction must be reversed because the indictment did not specifically recite the "question under inquiry." No authority has been cited

which suggests that Rule 7(c), FED. R. CRIM. P., requires an indictment under the statute to recite details of the authority and scope of inquiry.[17]

(6) Finally, appellant challenges the Subcommittee's subpoena power. The essence of this attack is that the subpoena under which appellant testified was invalid because the Committee had no reason to call appellant. This argument by its terms rests on the theory that in order to call appellant the Committee must show it had reason to believe he was or had been affiliated with or had information about Communists. Information about Communists is not the exclusive property of Communists. Many persons innocent of Communist Party connections and bitterly hostile to Communism may possess important information about such activities. Hence a belief or showing that the Committee must have reason to believe the witness is or once was a Communist or in sympathy with them is unnecessary. The second phase goes to the argument that a legislative committee has no power to employ compulsory process without some reason to believe the witness has information about the subject under inquiry. There is relatively little authority on this general subject but *United States* v. *Orman*, 207 F.2d 148, 154-5 (3d Cir. 1953), suggests that congressional committees may not subpoena private citizens at random "indiscriminately in the mere hope of stumbling upon valuable information and to cite them for contempt if they refuse to answer. . . ." The Supreme Court in *Barenblatt* noted the absence of evidence "that the Subcommittee was attempting to pillory witnesses," and absence of evidence that "petitioner's appearance as a witness follow[ed] from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." 360 U.S. at 134.

A careful review of this record satisfies us that the authority of the Subcommittee to conduct the hearings is

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[17] Sacher v. United States, 102 U.S.App.D.C. 264, 267, 252 F.2d 828, 831 (1958), held that an indictment under this statute need not "recite details of the authority and scope of the inquiry" and that holding stands undisturbed by the Supreme Court's action in Sacher v. United States, 356 U.S. 576 (1958).

plain, that there was full awareness on the part of the appellant that the subject matter was the possible infiltration of Communists into the radio, TV, and the press, including his own paper and that the questions were plainly pertinent to the topic. There is not the slightest indication in this record of an effort or desire or a tendency to pillory the appellant or other newspaper men or to call them indiscriminately without reason. After the important revelations of Winston M. Burdett, it was surely not a "dragnet" process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees. The proper balance between individual rights and the broad public interests at stake here must be resolved in favor of the latter.

Other errors assigned by appellant have been carefully considered but we find no error which warrants reversal.

Affirmed.

APPENDIX B

Statutes and Constitutional Provisions Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,00 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

> "Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> "Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> "Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and
>
> "Whereas it is vital to the internal security of the

United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."